(2)

No. USSC NO. 91-1020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MASON H. ROSE,

Petitioner,

v.

SUSAN T. FULTZ, ROGER E. HAWKINS, CHRISTA M. HAWKINS, AND HOME SAVINGS OF AMERICA, F.A.,

Respondents.

RESPONSE OF ROGER E. HAWKINS, CHRISTA M. HAWKINS AND HOME SAVINGS OF AMERICA, F.A. TO PETITION FOR WRIT OF CERTIORARI OF MASON H. ROSE

KENNETH J. ARAN
ARAN & MILLER
10920 Wilshire Boulevard
Suite 1000
Los Angeles, California 90024
(310) 208-6226

Counsel of Record
For Respondents, Roger E. Hawkins, Christa M. Hawkins and Home Savings of America, F.A.

JEFF BERKE, ESQ.
10920 Wilshire Boulevard, Suite 1000
Los Angeles, California 90024

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES AMD RULES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MASON H. ROSE, Petitioner

vs.

SUSAN T. FULTZ, ROGER E. HAWKINS, CHRISTA M. HAWKINS, AND HOME SAVINGS OF AMERICA, F.A., Respondents

---

RESPONSE OF ROGER E. HAWKINS, CHRISTA M. HAWKINS AND HOME SAVINGS OF AMERICA, F.A. TO PETITION FOR WRIT OF CERTIORARI OF MASON H. ROSE

Respondents Roger E. Hawkins, Christa M. Hawkins and Home Savings of America, F.A.[1] ("Respondents") hereby respond to and oppose the Petition for a Writ of Certiorari filed in this matter by Petitioner Mason H. Rose ("Rose") on the grounds that the California state

[1]Home Savings of America, F.A. is a federal savings bank owned by H.F. Ahmanson & Company, a Delaware corporation. It has no subsidiaries that are not wholly owned.

court judgment below is not appropriate for review by the Supreme Court of the United States.

I.

QUESTIONS PRESENTED

The four "questions presented" by Rose at p. i of his petition, in and of themselves, show that this case is not one over which this Court can properly assert jurisdiction. Indeed, the first two questions ask the Court to decide an issue that was already decided in both the Ninth and Tenth Circuits in prior federal court actions. (Appendix, pp. A6-11, B2-5). If a reviewable issue existed, it existed in those actions, not in the case at bar, which merely held that the prior orders collaterally estop Rose from again asserting his jurisdictional claims in the California state court. (Rose Appendix, pp. A11-

13, A18-19).[2]

Similarly, the second two questions presented by Rose are ones which should have been asserted, if at all, in the prior federal court proceedings which gave rise to the judgment under attack. Moreover, the questions, as stated, are not questions over which this Court can assert jurisdiction since they relate to the application of California law by a California court and, thus, do not present federal questions.

In addition to the questions set forth by Rose, which, as noted, demonstrate this Court's lack of jurisdiction, Respondents assert that the following questions should be considered by the Court in determining whether to grant the instant petition:

[2]The California trial court and appellate judgments are both included in the appendix to Rose's petition. When referring to said documents in this response, Respondents will cite to Rose Appendix, p. _____.

1. May this Court determine issues of federal due process which were not adequately presented in or passed upon by the state court?

2. Does the petition fail to present a basis for review by this Court and/or does the existence of a separate and independent non-federal ground for the California court's decision prevent this Court from exercising jurisdiction over the instant matter?

a. Does the California state court's application of California law relating to collateral estoppel give rise to a federal question within the purview of this Court?

b. Does the California state court's determination that Rose's complaint constituted an improper collateral attack on the prior federal judgments pursuant to California law give rise to a federal question within the purview of this Court?

c. Does the California state court's determination that Rose is unable to set forth a valid cause of action against these Respondents in his complaint give rise to a federal question within the purview of this Court?

3. Does Rose's failure to properly set forth the grounds for the purported jurisdiction of this Court in his petition require its denial?

II.

JURISDICTION

Rose's purported "statement" of the jurisdiction of this Court to hear the instant matter is grossly inadequate (Petition, p.3). Rose generally cites 28 U.S.C. Section 1257 as the basis for this Court's jurisdiction, but fails to enlighten either the Court or the Respondents as to which part of that Statute he contends is applicable, or the reasons therefor. (See Rules of the Supreme Court of the United States, 10, 14(h)(j)). It is Respondents' position that this Court lacks the jurisdiction to grant Rose's petition, and that Rose's failure to present an adequate jurisdictional statement impliedly, but undeniably, recognizes this fact. (See discussion, Section IV(E), infra.)

III.

STATEMENT OF THE CASE

Respondents will not burden this Court with a point-by-point refutation of the lengthy "Statement of the Case" presented by Rose in his petition (pp. 3-30). Indeed, it is Respondents' position that the bulk of Rose's statement constitutes nothing more than an attempt to reargue the merits of the claims he asserted in the California courts (and previously in the California and Colorado District Courts and the Ninth and Tenth Circuits), rather than provide the court with authority as to why it should assert jurisdiction over this matter. As such, most of Rose's statement is irrelevant to the Court's determination of the instant petition. Nonetheless, in order for the Court to accurately assess the dubious merits of Rose's petition, Respondents believe it important to correct certain of its

inaccuracies.

1. To begin with, Rose incorrectly characterizes the California judgment as being based solely on the doctrine of res judicata/collateral estoppel (Petition, pp.3-4). In doing so, Rose ignores the separate and independent ground asserted by the trial court in its judgment, i.e., Rose's inability to set forth a valid cause of action against Respondents. (Rose Appendix, pp. A19-20). This omission is significant because the existence of such a clearly non-federal ground for the state court's decision in and of itself requires the denial of the instant petition. (See discussion, Section IV(D)(3), infra.)

2. Rose similarly ignores the discussion by the California Court of Appeal, in support of its decision affirming the trial court judgment, of the doctrine of collateral attack, which

is related to but separate from res judicata/collateral estoppel (Rose Appendix, p. A13). Again, collateral attack was relied upon as an independent (and clearly non-federal) ground for the California judgment, precluding review by this Court. (See discussion, Section IV(D)(2), infra.)

3. Rose's repeated assertion that he adequately raised the issue of due process in the California courts (Petition, pp. 9-11, 35, 41), is wholly belied by the record. If anything, Rose's mention of due process in the California court consisted of a few isolated, throwaway references, which lacked <u>any</u> discussion or citation of federal authorities. This type of fleeting and general reference to a federal right is insufficient to confer jurisdiction upon this Court, particularly where the state court gave no evidence that it considered any

federal issues in making its decision. (See Section IV(C), infra).

IV.

LEGAL ARGUMENT

A. INTRODUCTION

The instant petition marks the third time that Rose has petitioned this Court for a Writ of Certiorari in connection with the events that led to the judgment below.[3] Although the precise arguments contained in his petitions may vary, the underlying basis remains the same: Rose will not rest until he finds a court - any court - which will render him a favorable decision. Thus far, he has been unsuccessful in achieving his goal in the District Courts of Colorado and California, the United States Bankruptcy Court for the Central District of

[3]See Rose v. Fultz, 486 U.S. 1007, 100 L.Ed.2d 197, 108 S.Ct. 1733 (1988); Rose v. Fultz, 486 U.S. 1056, 100 L.Ed.2d 925, 108 S.Ct. 2842 (1988).

California, the Ninth and Tenth Circuit Courts of Appeal, the Superior Court of California, the California Second District Court of Appeal and the California Supreme Court.

Similarly, this Court has deemed it advisable to deny each of Rose's prior petitions. There is nothing contained in his latest document to warrant a different result and it is respectfully requested that the instant petition therefore be denied.

B. SUMMARY OF ARGUMENT

The instant petition must be denied by this Court because Rose fails to set forth an adequate basis for this Court's review. Indeed, the record shows that the California state judgment was founded on three separate and independent non-federal grounds - collateral estoppel, collateral attack and failure to set forth a cause of action. The existence of any of these

grounds, by itself, would be sufficient to defeat Supreme Court jurisdiction. Moreover, even if a federal question did exist with no independent state grounds to support the California judgment, Rose failed to adequately present such question in the California court so as to preserve it for review here.

For all of the above reasons, Rose's petition should be denied.

C. ROSE'S FAILURE TO ADEQUATELY RAISE THE DUE PROCESS ISSUE IN THE STATE COURT PREVENTS HIM FROM RAISING IT HERE

The Supreme Court is without jurisdiction to rule on an issue that has not been presented "and passed upon" in the state court below. See Webb v. Webb, 451 U.S. 493, 496-97 68 L. Ed. 2d 392, 397, 101 S.Ct. 1889 (1981):

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the

record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."

As noted in Webb, it is required that a federal issue be adequately raised in the state court by the petitioning party, as opposed to an off-handed reference hidden in the party's brief. See also Board of Directors of Rotary Intl. vs. Rotary Club, 481 U.S. 537, 550, n.9, 95 L. Ed.2d 474, 487, 107 S.Ct. 1940 (1987):

> "[The] casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction under 28 USC Section 1257 (2)..."

Rose's arguments in the instant petition must be measured against the above rules. By his own admission, Rose

purportedly "raised" the constitutional due process question in the trial court through his bare mention of the words "due process" in two isolated instances in opposition papers spanning more than 40 pages. (Petition, pp. 9-11,[4] CT 322-365). These vague references were unaccompanied by any discussion of the Constitution, constitutional language relating to due process, or any case discussing federal due process concerns. (See Appendix, pp. C1-4).[5]

Rose's contention (at pp. 35-41 of his petition) that he raised the due process issues in the California

[4]In addition to being factually unsupportable, Rose's discussion in his petition with regard to his raising of the federal questions in the court below falls woefully short of the standard required by the Supreme Court Rules. (Rules of the United States Supreme Court, 14(h)).

[5]The pertinent passages from the record containing Rose's references to "due process," as cited in his petition, are reproduced in Appendix C hereto.

appellate courts is equally dubious. Thus, at p. 19 of his opening brief in the California Court of Appeals, Rose simply cited his opposition brief reference to due process without elaboration. (Appendix, pp.C5-6)

On page 21 of his reply brief in the Court of Appeals, Rose cited the California case of In Re Marriage of Smith (1982) 135 Cal.App.3d 543, which was decided under California law, and based thereon, flatly states that "a determination of retroactive validation [of a default judgment] would be a violation of due process." (Appendix, p. C7). Again, there is no discussion whatsoever of a due process "issue," nor is there citation to any federal case, statute or constitutional provision. Indeed, the very paragraph in which the words "due process" appear solely involves a discussion of California law (Id.).

Rose's petition for Rehearing in the California Court of Appeals contains a reference to "due process" at pp. 13-14. It is here that Rose makes his first identification of the "respective Due Process Clauses of both the United States and California Constitutions." (Appendix, pp. C8-10). However, the reference is again perfunctory and devoid of discussion of the constitutional provisions themselves, or any cases which interpret them. As previously stated, a purported federal issue cannot be raised in such an off-handed manner in the state court and then argued in detail at the United States Supreme Court level.[6]

According to Rose, the final time he "raised" the due process issue in the

[6]See, Board of Directors of Rotary Intl. v. Rotary Club, supra, 481 U.S. at 550, 95 L.Ed.2d at 487, holding that an issue raised for the first time in a petition for an appellate rehearing was inadequately raised in the state court.

state court occurred at p. 21 of his Petition for Review filed with the California Supreme Court (Petition, p. 35). Although Rose again makes a blanket reference to the "Due Process Clauses of both the United States and California Constitutions," the reference is without discussion and appears in a section of his brief that solely rests upon California law. (Appendix, pp. C11-12).

Both the California Court of Appeals, on the request for rehearing, and the California Supreme Court denied Rose's petitions without opinion. (See Rose Appendix, pp. A21-22). Thus, as stated in Fuller vs. Oregon, 417 U.S. 40, 50, n. 11, 40 L. Ed. 2d 642, 653, 94 S.Ct. 2116 (1974):

> "[When] the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state

courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Rose cannot make such an affirmative showing here. Instead, this case resembles Bankers Life and Casualty Company vs. Crenshaw, 46 U.S. 71, 77, 100 L. Ed. 2d 62, 71, 108 S.Ct. 1645 (1988), where the Court held that a reference in a brief that the court's award "violates constitutional principles" did not adequately raise a federal issue in the state court proceeding:

> "The vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claim. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this court to specify the constitutional

provision it is relying upon. Cf. Taylor vs. Illinois, 484 U.S. 400, 407, n. 9, 98 L. Ed. 2d 798, 108 S.Ct. 646 (1988) ('A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights...')."

Because Rose failed to adequately raise his purported due process concerns in the state court, he is barred from having them reviewed here.

D. ROSE'S FAILURE TO SET FORTH A FEDERAL QUESTION FOR REVIEW AND/OR THE EXISTENCE OF INDEPENDENT STATE LAW GROUNDS FOR THE CALIFORNIA COURT'S DECISION PREVENT THIS COURT FROM GRANTING ROSE'S PETITION

Without a federal issue underlying a state court judgment this Court lacks jurisdiction to grant a petition for review. (28 U.S.C. Section 1257; Beals v. Cone, 188 U.S. 184, 188, 47 L.Ed.

435, 23 S.Ct. 275 (1902)). Moreover, even if a federal issue exists, Supreme Court jurisdiction will be defeated where a separate and independent non-federal ground for the state court's decision is also present.

In the case of Fox Film Corporation vs. Muller, 296 U.S. 207, 210, 80 L. Ed. 158, 159, 56 S.Ct. 183 (1935), this Court explained:

> "[It is a] settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, [the Supreme Court's] jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."

As will be shown, the existence of several separate and independent state grounds for the California court's decision requires the denial of the

instant petition.

1. THE CALIFORNIA COURT'S APPLICATION OF COLLATERAL ESTOPPEL WAS A DETERMINATION UNDER STATE LAW AND NOT SUBJECT TO REVIEW BY THIS COURT

The California judgment, both at the trial court level and on appeal, was based in part on the court's application of the doctrine of collateral estoppel. (Rose Appendix, pp. A11-13, A18-19). In his petition, Rose attempts to argue that the state court's invocation of collateral estoppel raised an issue of federal law. (Petition, pp. 40-43). This contention is without basis.

The provisions of California Code of Civil Procedure Sections 1908-1911, inclusive, govern the application of the doctrine of res judicata\collateral estoppel in California. Accordingly, when the court below invoked the doctrine of collateral

estoppel as a partial basis for the subject judgment against Rose, it was acting in compliance with the laws of the state in which the court sits. E.g. California State Auto Assn. Inter-Ins. Bureau v. Superior Court, (1990) 50 Cal.3d 658, 665; Trujillo v. County of Santa Clara, 775 F.2d 1359, 1366 (9th Cir. 1985).

It is well-settled that such a state court determination will not give rise to a "federal question" reviewable by this Court upon a petition for Writ of Certiorari. See e.g., Agins v. Tiburon, 447 U.S. 255, 259, n. 6, 65 L. Ed. 2d 106, 111, 100 S.Ct. 2138 (1980); Patterson v. Colorado, 205 U.S. 454, 461, 51 L. Ed. 879, 27 S.Ct. 556 (1907).

In Northern Pacific Railroad Co. v. Ellis, 144 U.S. 458, 36 L.Ed. 504, 12 S.Ct. 724 (1891), this Court dismissed a writ seeking review of a Wisconsin Supreme Court judgment that was based on

a finding of res judicata. In so doing, the Court noted:

> "The judgment before us was rendered in accordance with well-settled principles of general law, not involving any Federal question. . ." 144 U.S. at 465.

See also Gaar, Scott & Co. v. Shannon, 223 U.S. 468, 471, 56 L.Ed. 510, 32 S.Ct. 236 (1911); Creswell v. Knights of Pythias, 225 U.S. 246, 263, 56 L.Ed. 1074, 32 S.Ct. 822 (1911), where this Court reiterated that a state court determination based on res judicata will not be deemed a federal issue subject to Supreme Court review.

Rose's real complaint in this matter appears to lie with the federal court orders previously rendered. However, the California state court proceeding was not the appropriate place for him to raise such an argument. (See

Discussion, Section IV(D)(2), infra).[7]

Because Rose, in his petition, attacks the California judgment on the ground that it improperly applied the doctrine of collateral estoppel, he has failed to set forth a federal or constitutional issue, and his petition must be denied. (28 U.S.C Section 1257, Rules of the Supreme Court of the United States, 10).

2. THE CALIFORNIA APPELLATE COURT RULING THAT ROSE'S CLAIMS CONCERNING THE SALE OF HIS PROPERTY CONSTITUTED AN IMPROPER COLLATERAL ATTACK ON A PRIOR JUDGMENT WAS A STATE COURT DECISION THAT IS NON-REVIEWABLE IN THIS COURT

[7]Rose clearly had his opportunity to review the federal court rulings and indeed availed himself of that opportunity by twice petitioning for rehearings and upon the denial of such petitions, petitioning this Court for a Writ of Certiorari. When this Court denied his requests to be heard, Rose's rights to attack the federal decisions ended.

As previously noted, Rose's attempt to make an end run around the prior federal court rulings by virtue of his California state court action was deemed to be an impermissible collateral attack by the California Court of Appeal. In that regard, the court stated:

> "If a Court has jurisdiction over the subject matter and parties, the order or final judgment is not subject to collateral attack in a later proceeding, regardless of whether it is contrary to statute or otherwise erroneous." (Rose Appendix, p.A13).

Noting that the California District Court and Ninth Circuit clearly had valid jurisdiction over Rose, the court cited a California Supreme Court case, Moffat vs. Moffat (1980) 27 Cal.3d 645, 655-656, to support its holding.(Id.) Because the collateral attack doctrine

formed a separate ground for the court's decision based solely upon its application of state law, it constitutes an additional reason why this Court must deny Rose's petition.

3. THE CALIFORNIA COURT'S SUSTAINING OF THE DEMURRER BY RESPONDENTS ON THE GROUNDS THAT THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION AGAINST THEM CONSTITUTES AN INDEPENDENT STATE LAW GROUND THAT IS NON-REVIEWABLE BY THIS COURT

In the instant case, the trial court judgment could not be plainer as to the grounds for its decision. It held, in relevant part, that:

> "the Demurrer of Moving Defendants to the First Amended Complaint of Mason H. Rose, V., is sustained without leave to amend on each of the independent grounds set forth below..." (Rose Appendix, p.A18).

The Court then set forth the two

grounds upon which it based its decision: (1) collateral estoppel and (2) failure to state a cause of action against the Respondents herein. (Id. at pp. A18-19). As to the second ground, the Court rendered its opinion that Rose would be unable to amend his pleadings to state a valid cause of action against Respondents herein because:

> "the facts provided by Plaintiff Rose clearly show that the subject property was purchased by the Hawkins and financed by Home, respectively, pursuant to a valid Court Order expressly authorizing the purchase. Accordingly, based upon Rose's own allegations, the acts engaged in by [Respondents herein] relating to this matter cannot possibly give rise to liability against Plaintiff Rose." (Id. at pp. A19-20).

It would hardly seem to need

argument that the sustaining of a demurrer by a California court on the grounds that the complaining party is unable, as a matter of California law, to state a claim, is purely a state action with no federal or constitutional overtones whatsoever. See generally, Agins v. Tiburon, supra. As such, the trial court's determination that Rose could not state a cause of action bars this Court from asserting jurisdiction over the instant cause and requires the dismissal of Rose's petition. E.g., Fox Film Corp. v. Muller, supra.

E. ROSE'S FAILURE TO ADEQUATELY SET FORTH THE BASIS FOR THIS COURT'S JURISDICTION IS CAUSE TO DENY THE PETITION

Rose's petition does nothing more than rehash the arguments he raised below as to why each and every court that has heard the claims leading to the state court judgment has been in error.

Despite his burden to do so, he presents no authority supporting his position that this is an appropriate case for Supreme Court review.

As previously discussed, Rose's statement of the jurisdiction of this Court (Petition, p. 3) is woefully inadequate and in violation of the Rules of the United States Supreme Court, 10 and 14 (h)(j). Thus, although he makes a brief, general reference to 28 USC Section 1257, he does not specify which portion of the statute applies to the instant case, nor does he provide any clue as to why this case would fall within the provisions of such statute. Inasmuch as it is Rose's burden, as Petitioner, to direct the Court and Respondents to the jurisdictional basis he is asserting, Rose's failure to meet this burden should, in and of itself, require the denial of his petition. E.g. Gorman v. Washington University,

316 U.S. 98, 101, 86 L.Ed. 1300, 1302 (1942).

F. ROSE'S CLAIMS OF ERROR ARE WITHOUT MERIT

Aside from the fact that this Court must deny Rose's petition for all of the jurisdictional and procedural reasons set forth above, Rose's claims of error in the state court proceedings are simply wrong. In a nutshell, the California judgment was correct for the following reasons:

1. The June 1987 Ninth Circuit Order unequivocally ruled that Rose had waived any objections to the exercise of jurisdiction over him by the Colorado District Court (Appendix, pp. A6-11). Because the Ninth Circuit clearly had jurisdiction over Rose he is barred by California law from collaterally attacking that Order in the California state court proceeding. (See Moffat v. Moffat (1980) 27 Cal.3d. 645,

655-56). Thus, Rose was correctly estopped from reasserting claims in the state court which arose from his much-litigated contention that the Colorado District Court lacked jurisdiction over him to grant the 1984 default judgment that ultimately gave rise to the subject proceedings.

2. The December 1987 Ninth Circuit Order provides, in relevant part, that: "Fultz sold the Rose property to Mr. and Mrs. Hawkins [Respondents herein] in compliance with the district court's March 7, 1986 order." The Court further stated that "Vacation of the March 7 order shall not operate retroactively and shall have no effect on actions or conduct already undertaken in reliance on or under the authority of that order." (Appendix, p. D2). Clearly the quoted language was meant to uphold the validity of the sale of Rose's property to the Hawkins. To claim otherwise, as

Rose does, is to simply ignore the existence of the "non-retroactive" portion of the court's opinion, contrary to the basic rules of construction of written documents. (See generally Ocean Shore Railroad Co. v. Doelger (1954) 127 Cal.App.2d 392, 399; Spearman v. J & S Farms, Inc., 755 F.Supp. 137, 140 (D.S.C. 1990).

3. As previously noted, the December 1987 Ninth Circuit decision recognized that the subject property was purchased by Respondents in compliance with the express commands of a valid court order.[8] Because Rose's only claims against Respondents resulted from their purchase of the subject property

[8]The Ninth Circuit must have found the District Court's order of sale valid in the first instance. If such order was void, as argued by Rose, there would be nothing to vacate, non-retroactively or otherwise. As the California Court of Appeals noted, a valid court order cannot be collaterally attacked in another proceeding. (Rose Appendix, p.A13).

pursuant to such order, it is clear that Rose is unable to state a valid cause of action against them. Accordingly, the Court's ruling that Rose's Complaint must be dismissed against Respondents was a reasonable and correct decision which cannot be overturned by Rose in this forum. (Rose Appendix, p.A20).

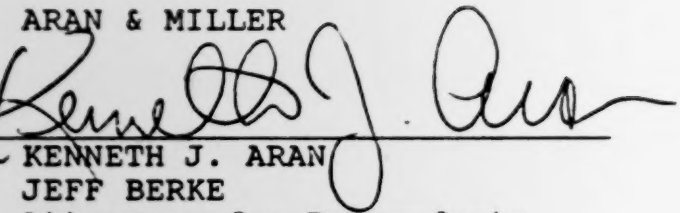
V.

CONCLUSION

Rose would have this Court believe that he is an innocent litigant who has been unfairly deprived of his day in court. Nothing could be further from the truth. Indeed, Rose has had many days in many courts. The time has now come to end Rose's abuse of the instant litigants, as well as the system itself. Accordingly, it is respectfully requested that the Petition for Writ of

Certiorari be denied.

ARAN & MILLER

By: 

KENNETH J. ARAN
JEFF BERKE
Attorneys for Respondents
ROGER E. HAWKINS, CHRISTA M. HAWKINS and HOME SAVINGS OF AMERICA, F.A.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 85-6202
86-5528

DC# CV 85-1854-TJH
MEMORANDUM*

[File Stamped] JUN 10 1987

SUSAN THERESE FULTZ, a/k/a/
SUSAN FULTZ-SMALL,

Plaintiff-Appelee,

v.

MASON H. ROSE, V,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding
Argued and Submitted December 3, 1986 - Pasadena, California

---

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Before: ANDERSON, PREGERSON**, and CANBY, Circuit Judges.

Appellant, Mason Rose (Rose), filed separate appeals from two judgments rendered by the United States District Court for the Central District of California. In both appeals, Rose attacks the validity of a default judgment entered against him by the United States District Court for the District of Colorado arguing that the Colorado court lacked personal jurisdiction over him because of improper service of process. These appeals were consolidated along with appellee's, Susan Fultz's (Fultz) motion in this court to dismiss on the ground of mootness or to suspend Rose's appeals.

**Judge Pregerson was randomly selected to replace Judge Solomon as a member of this panel because of the death of Judge Solomon

I. **FACTS**

On November 10, 1983, Fultz filed an action against Rose, an attorney, in the Colorado district court. Fultz made several unsuccessful attempts to serve Rose personally, both at his California residence and California law office. On February 20, 1984, Fultz served Wynonah Rose, appellant's wife, at a residence located at 37 Crest Road West, Rolling Hills, California. In addition, Fultz sent a summons by registered mail to Rose's law office on February 21, 1983.

Fultz made several motions over a period of eight months, the last of which was a motion for default. Rose failed to answer or appear in any of these motions. On December 5, 1984, Fultz obtained a default judgment against Rose from the Colorado district court awarding her $116,616 for compensatory damages and $348,137 for punitive damages, based on claims of

personal guarantee of a restaurant equipment lease, conversion of personal property, and breach of fiduciary duty.

On January 17, 1985, Fultz filed an action in the United States District Court for the Central District of California to enforce her Colorado judgment against Rose. She subsequently served notice on Rose to take a debtor deposition. When Rose failed to appear for the deposition, Fultz sought to hold him in contempt. District Judge Terry J. Hatter denied Fultz's contempt motion, but ordered Rose to attend a subsequent deposition. Rose attended the deposition as ordered, but refused to answer questions relating to anything other than personal jurisdiction. As a result, Fultz filed a second motion for contempt against Rose. At the same time that Fultz filed her contempt motion, Rose filed a motion to set aside the default judgment of the Colorado court

pursuant to Rule 60, Fed. R. Civ. P., because of lack of personal jurisdiction in the Colorado district court.

The court set the hearing on Fultz's motion for contempt for July 15, 1985. The court took Rose's motion to set aside the Colorado judgment off the calendar. At the July 15th hearing, the parties' arguments focused on the validity of the Colorado judgment. Judge Hatter ruled against Rose on his motion to set aside the Colorado judgment and, in addition, found Rose in contempt for failing to comply with the earlier court order to participate in the debtor deposition. Rose appeals both decision to this court.

On November 18, 1985 Rose filed a motion under Rule 60(b) to set aside Judge Hatter's July 15, 1985 decision. Judge Hatter denied Rose's motion on December 18, 1985. In March, 1986, this court consolidated Rose's two appeals

and remanded them nunc pro tunc so the district court could dispose of Rose's November 18, 1984 Rule 60(b) motion.

On December 11, 1985, while pursuing his Rule 60(b) motion in the California district court and his appeal to this court, Rose filed a Rule 60(b) motion in the Colorado district court for relief from the punitive damages and to correct the default judgment entered by that court in December, 1984. Rose offered to confess liability for compensatory damages. On March 14, 1986, Fultz filed a motion in this court to dismiss both of Rose's appeals to this court on the ground of mootness. In the alternative, Fultz seeks to suspend these appeals while her case in Colorado is being litigated.

II. DISCUSSION

The single issue addressed by this court is whether Rose's appearance in the Colorado district court to set aside

the default judgment renders moot the appeals filed by both Fultz and Rose. We find that it does.

The underlying argument in the consolidated appeals before this court is that the Colorado district court lacked personal jurisdiction over Rose because he was never properly served in accordance with the provisions of Rule 4 of the Federal Rules of Civil Procedure. Therefore, if the Colorado district court had personal jurisdiction over Rose, either because Rose conferred jurisdiction upon the Colorado district court, or Rose waived his right to complain of a defect in service or personal jurisdiction, then the appeals before this court can properly be dismissed as moot. We find that both events occurred.

Jurisdiction attaches if a defendant makes a voluntary general appearance. Jackson v. Hayakawa, 682

F.2d 1344, 1347 (9th Cir. 1982), appeal after remand 761 F.2d 525 (9th Cir. 1985).

> Generally, an appearance in an action involves some presentation or submission to the court. [citation omitted]. An appearance may result from the filing of an answer without raising jurisdictional defects. An appearance may also arise by implication "from a defendant's seeking, taking, or agreeing to some step or proceeding in the cause beneficial to himself or detrimental to plaintiff other than one contesting only the jurisdiction or by reason of some act or proceedings recognizing the case as in court. 6 C.J.S. Appearances Section 18 at 22 (1975). [citation omitted].

Cactus Pipe & Supply v. M/V Montmarte, 76 F.2d 1103, 1108 (5th Cir. 1985). On December 11, 1985, Rose filed a Rule 60(b) motion in the Colorado district court to set aside the default judgment entered by that court one year earlier. In that motion, Rose only challenged the punitive damage award against him. (He

later withdrew his confession of liability to compensatory damages and now contests that too). Rose informed the Colorado court that he was challenging the jurisdiction of that court to this court, but he did not raise any jurisdictional challenges before the Colorado court itself. We find that Rose's actions constituted a voluntary general appearance before the Colorado district court vesting it with personal jurisdiction.

Furthermore Rose waived the defect of lack of personal jurisdiction by appearing generally without first challenging the service of process problem in a preliminary motion or responsive pleading before the Colorado district court. Jackson, 682 F.2d at 1347; Benny v. Pipes, 799 F.2d 489, 492 (9th Cir. 1986) opinion amended in 807 F.2d 1514 (1987) (general appearance by defendant failing to dispute personal

jurisdiction waives any defect in service or personal jurisdiction); Fed. R. Civ. P. 12(h)(1). Therefore, Rose has waived any challenge to the Colorado district court's personal jurisdiction over him based on any alleged defect in service.

Rose's argument that he has not waived his jurisdictional challenge because he raised and maintained his jurisdictional challenge in the California district court and now in this court on appeal is unpersuasive and the cases to which he cites for support are inapposite. See Chase v. Pan-Pacific Broadcasting, Inc., 750 F.2d 131 (D.C. Cir. 1984); Fahey v. O'Melveny & Myers, 200 F.2d 420, 451 n.9 (9th Cir. 1952); Orange Theatre Corp. v. Rayherstz Amusement corp., 139 F.2d 871, 874 (3d Cir.), cert. denied, 322 U.S. 740 (1944). These cases held that a defendant does not waive his

jurisdictional defenses if he meshes them with defenses on the merits. Furthermore, in each of these cases, the defendant objected to the jurisdictional defect in a pre-answer motion or in the answer itself before the court in which he was appearing. In the case at bar, Rose did not raise a jurisdictional defense in the Colorado court.

The district court's order of July 15, 1985, upholding the validity of the default judgment and finding Rose in contempt is VACATED. The consolidated appeals before this court are DISMISSED as moot. The parties may now pursue this case before the Colorado district court which now has jurisdiction over the parties and may address the issues on the merits.

APPENDIX B

8/28/86 United States District Court Order Denying Rose's Motions Under Rule 60

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 83-M-2163

[File-Stamped] APR 28 1986

SUSAN THERESE FULTZ, a/k/a
SUSAN FULTZ-SMALL,

Plaintiff,

v.

MASON H. ROSE, V.; H. L. QUIST, and
H. L. QUIST DEVELOPMENT CORP.,

Defendants.

ORDER DENYING ROSE'S MOTIONS
UNDER RULE 60

This court entered a default judgment in this matter on December 11, 1984, as against the defendant Mason H. Rose, V., and further ordered that the judgment be entered as a final judgment under F.R.Civ.P. 54(b). On December 11, 1985, the defendant Rose filed

"Defendant Rose's Motion for Relief From Default Judgment, By Reason of Mistake And Misrepresentation [FRCP 60(b)(1) and 60(b)(3)], And By Reason Of Clerical Mistake [FRCP 60(a)]," with a supporting brief and affidavit of Mason H. Rose, V. The plaintiff filed a response on December 23, 1985, although this court did not order a response to be filed. In that response, the plaintiff seeks attorney's fees for its filing. Some additional papers have now been filed by both parties.

After careful consideration of the Rose motions, filed December 11, 1985, this court finds and concludes that there is no showing of any basis for relief under Rule 60. What is shown is that having elected not to appear and defend in this civil action, and having chosen the tactic of attacking this court's judgment in California where the plaintiff has sought to recover on the

judgment, and having failed in doing so, the defendant Mason H. Rose, V. now seeks belatedly to carry on this litigation at this late date. The defendant was given every opportunity to appear and defend in this case, due process was provided, and there was no factual or clerical error in this court's findings and judgment.

The plaintiff was not required to file a response to the Rule 60 motions, and this court will not prolong this matter by further proceedings directed to the attempt to recover attorneys' fees for a volunteered response.

Upon the foregoing, it is

ORDERED, that the defendant Rose's motions, filed December 11, 1985, are denied.

Dated: April 28, 1986

BY THE CO

/s/Richa
Judge

UNITED STATES

TENTH CIRCUIT

United States Court of Appeals
Order and Judgment

[File Stamped] MAY 10 1988

No. 86-1779
(D.C. No. Civil 83-M-2163)
(D. Colo.)

SUSAN T. FULTZ,

Plaintiff-Appellee,

v.

MASON H. ROSE, V.,

Defendant

Before M
Circuit J.

Upon consideration of all the issues raised in this case, we find that the district court did not abuse its discretion in granting the defendant's

B-5

Fed. R. Civ. P. Rule

All pending motions are denied and the judgment of the district court is affirmed.

AFFIRMED.

ENTERED FOR THE COURT

Deanell Reech Tacha
Circuit Judge

APPENDIX C

Excerpts from p. 15 of Rose's Opposition to Demurrer and Motion for Judgment on the Pleadings in the Trial Court (CT 337)

The Ninth Circuit order (Exhibit G) held that Rose waived improper service by appearing generally in Colorado a year after the default judgment, but it did not hold that the waiver was retroactive or that the jurisdictional issue was waived as to the judgment so as to ate it retroactively if it was void. If it had, that would have been a violation of due process. See In Re Marriage of Smith (1982) 135 Cal.App.3d 543, 549-50. We are not aware of any federal law on the subject, but both California and Colorado law forbid retroactive validation of a void judgment by a postjudgment general appearance. In re Marriage of Smith, supra, 135 Cal.App.3d 543 [general

appearance did not retroactively cure defective service]; Weaver Construction Co. v. District Court (Colo. 1976) 545 P.2d 1042, 1046 ["The general appearance subjected Robert Grinnell only to the jurisdiction of the court from the date of the appearance, and is not retroactive so as to ate the void judgment."].

Excerpts from pp. 18-19 of Rose's Opposition to Demurrer and Motion for Judgment on the Pleadings in the Trial Court (CT 340-41)

Why then was the district court's order vacated nonretroactively? The answer lies in the emphasized words of the last sentence of Exhibit I: "Vacation of the March 7 order shall not operate retroactively and shall have no legal effect on actions or conduct already undertaken in reliance on or under the authority of that order." (Emphasis added.)

Those words must have been intended to mean what they say, that vacation shall have no legal effect on those actions. That means no legal effect either way; Rose cannot claim the sale was in simply because the sale order was vacated, but conversely defendants cannot claim that the sale was simply because the vacation was nonretroactive.

Any other interpretation would

violate Munsingwear, contradict the Ninth Circuit's express reliance on that case, and deny due process to Rose. Furthermore, it would lead to an absurd result: If the Ninth Circuit could not decide Rose's rights because Hawkins was not present, then a fortiori they could not decide the rights of Hawkins (and Fultz) for the same reason. Yet that is what Hawkins and Fultz ask this Court to rule.

Excerpts from pp. 19 and 20 of Rose's Opening Appellate Brief in the California Court of Appeals

Finally, we asserted (CT. 341) that any other interpretation would deny due process to Rose. Whether or not the appellate court vacates the order appealed from when the appeal is mooted, the denial of the right to appeal (unless it is the choice of the plaintiff not to appeal) also denies a full and fair hearing on the issues of the appeal.

California courts recognize that "Collateral estoppel may be applied only if due process requirements are satisfied. The party sought to be estopped must have had a fair opportunity to pursue his or her claim the first time." Mueller v. J.C. Penney Co. (1985) 173 Cal.App. 3d 713, 720; citations omitted.

We are not aware of any California cases on the effect of the lack of a

right to appeal on that fair opportunity, but that problem is the first of several examples given by section 28 of the Restatement (Second) of Judgments, which provides as follows:

> "Sec. 28. Exceptions to the General Rule of Issue Preclusion
>
> "Although an issue is actually litigated and determined by a and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> "(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action;"

Excerpt from p.21 of Rose's Reply Brief in the California Court of Appeals

California law is the same. In re Marriage of Smith (1982) 135 Cal.App.3d 543, 549-50, discussing the deprivation of due process inherent in a contrary rule. Based on that discussion, and the facts of this case, Rose contends that a determination of retroactive validation would be a violation of due process.

Excerpts from pp. 13-14 of Rose's Petition for Rehearing in the California Court of Appeal

There was no such determination, and no mention of jurisdiction, in the Colorado court's 1986 denial of Rose's rule 60 motion, or in the Tenth Circuits order on the appeal from that denial. Where the defendant does not appear, he is "free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding. (Ins. Corp.of Ireland, supra, 450 U.S. at 701). His right to do so is a constitutional right under the Due Process Clause. (Id., 450 U.S. at 702). Furthermore, if a federal judgment is void, it "is a legal nullity and may be collaterally attacked at any time," "in any proceeding wherein the ity of the judgment is appropriately challenged." (7 Moore &

Lucas, Moore's Federal Practice (2d ed. 1990) Para. 60.41[2] at p. 60-417.) That attack on a void federal judgment may be made in a state court. (Ibid.)

28. Rose's postjudgment general appearance in Colorado could not constitutionally ate the void default judgment, and the applicable law of both states involved here (Colorado and California) holds that it does not. We are not aware of any separate federal law on that question (neither the case cited by this Court [Slip. Op. at 8], nor any case cited by that case, involved a postjudgment general appearance. However, the Colorado case relied on by Fultz, in her successful motion to dismiss Rose's appeal as moot, expressly held that a judgment void for lack of service was not retroactively validated by a later general appearance. (Weaver Const.Co. v. District Court

(Colo. 1976) 545 P.2d 1042, 1046.) California law is the same. In re Marriage of Smith (1982) 135 Cal.App.3d 543, 549-50, holds that a general appearance did not retroactively cure defective service, and discusses the deprivation of due process inherent in a contrary rule. We raised that due process issue below, at the first opportunity (CT 337), and again in this court, in Rose's Reply Brief (at 21). We raise it again here; interpreting the June 1987 Ninth Circuit Memorandum to retroactively ate the default judgement would be a violation of Rose's rights under the respective Due Process Clauses of both the United States and California Constitutions.

Excerpt from p.21 of Rose's Petition for Review in the California Supreme Court

3. A holding of retroactive waiver violates due process.

California law is the same as that of Colorado, by statute. In re Marriage of Smith (1982) 135 Cal.App.3d 543, 549-50, holds that a general appearance did not retroactively cure defective service, and discusses the deprivation of due process inherent in a contrary rule (135 Cal.App. 3d) at 549-50; footnotes omitted:

> "[H]ere we are--as fine an example as possible of the quotation above concerning metaphors and how unreflecting use of legal concepts leads to unintended results. The rule began as an aid to justice and became one of automatic application, a trap for attorneys who find it difficult to predict safely what the next judge will call a 'general appearance,' depriving unwary defendants of '"The fundamental requisite of due process of law. . .the opportunity to be heard."'"

Rose raised that due process issue

below, at the first opportunity (RT 337), and again in the Court of Appeal, in his Reply Brief (at 21) and his Petition for Rehearing (at 13-14). He raises it again here; interpreting the June 1987 Ninth Circuit Memorandum to retroactively ate the det[illegible] is a violation of Rose[illegible] the respective Due Process clauses of both the United States and California Constitutions.

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Argued and Submitted
November 6, 1987 - Pasadena, California

Filed December 11, 1987

Before: Arthur L. Alarcon, Dorothy W. Nelson and Stephen Reinhardt, Circuit Judges.

COUNSEL

James A. Beckwith, Wheat Ridge, Colorado, for the plaintiff-appellee.

[illegible] Weinberg, Los Angeles, [illegible] the defendant-appellant.

ORDER

n the above captioned
ISMISSED as moot. An
missed as moot when
that do not involve
the appellee leave
nable to grant
re Combined Metals
2d 179, 189 (9th
the Rose
Mrs. Hawkins in
district court's
. Because Mr.and Mrs.
rties to this action,
ble to grant any
rom that order or to
of this appeal.

In accordance with the Supreme Court's guidance in United States v. Munsingwear, 340 U.S. 36, 29 (1950), we dismiss this appeal and vacate the district court's order entered March 7, 1986. Vacation of the March 7 order shall not operate retroactively and shall have no legal effect on actions or conduct already undertaken in reliance on or under the authority of that order.